

SUPREME COURT - STATE OF NEW YORK  
WESTCHESTER COUNTY

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED  
ON 6/25 2010  
WESTCHESTER  
COUNTY CLERK

PRESENT: HON. FRANCIS A. NICOLAI

Justice

-----X  
SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 21162/09  
Motion Date: 3/19/10

-against-

THE NATURE CONSERVANCY, ROBERT BURKE,  
TERI BURKE, NOEL B. DONOHOE and  
JOANN DONOHOE,

DECISION

Defendants.  
-----X

**FILED**

JUN 25 2010

TIMOTHY C. DONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

The following papers numbered 1 to 60 read on this motion.

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits 1-6/Memorandum of Law, TNC	1-9
Notice of Motion/Affirmation/Exhibits A-H/Memorandum of Law, Burke	10-20
Notice of Motion/Affirmation/Exhibits A-C/Memorandum of Law, Donohoe	21-26
Notice of Cross Motion/Affidavit/Exhibits A-K/Affidavit/ Memorandum of Law, Plaintiff	27-41
Reply/Opposition Affirmation/Exhibits 7-9/Memorandum of Law, TNC	42-46
Reply /Opposition Affirmation/Exhibits 1-2/Memorandum of Law, Burke	47-50
Reply/Opposition Affirmation/Exhibits A-G/Memorandum of Law, Donohoe	51-59
Reply Memorandum of Law, Plaintiff	60

Upon the foregoing papers, it is ORDERED that the motions by defendants to dismiss plaintiff's complaint and the cross motion of plaintiff for an order granting plaintiff leave to serve and file an amended complaint, are decided as follows.

On September 22, 2009, Seven Springs, LLC commenced this action against the named defendants seeking to recover money damages from defendants for defendants' actions in denying and precluding plaintiff from exercising its rights to an easement, which provides access to plaintiff's property over a road known as Oregon Road in the Town of North Castle, New York.

Plaintiff's complaint alleges the following single cause of action. Plaintiff is a New York Limited Liability Company, which owns 213 acres of real property ("the parcel") in the Towns of New Castle, North Castle and Bedford, Westchester County. At some time prior to 1973, Oregon Road, abutted by plaintiff's parcel, became a public highway by virtue of its having been used as a public highway for a period of ten years. In or about 1990, the Town of North Castle closed a portion of Oregon Road, pursuant to Highway Law §205, as the road was no longer used for public travel. The closed portion of the road ends at a legally opened public street that has been improved and paved. At some point, the Town of North Castle erected a barrier gate and/or metal guardrail ("gate") obstructing and impeding access to or from Oregon Road to the south by persons in vehicles, coming from plaintiff's parcel. Plaintiff's development of its parcel requires a secondary access to the parcel. Defendants have improperly taken the position that plaintiff has no right to access the parcel from the south over Oregon Road and have willfully deprived plaintiff of its right to develop its parcel; damages are continuing.

The complaint alleges further that defendants, The Nature Conservancy ("TNC"), Robert Burke and Teri Burke ("Burkes") and Noel B. Donohoe and Joann Donohoe ("Donohoes") have no valid basis, in law or fact, to maintain a gate or any other obstruction or barrier over Oregon Road, obstructing plaintiff's access to its parcel over Oregon Road. Defendants' actions have diminished the financial value of the parcel warranting compensative and punitive damages.

Defendants TNC, the Burkes and the Donohoes have moved to dismiss plaintiff's complaint on the grounds that the complaint fails to state a cause of action. Subsequent to the making of defendants' motions, plaintiff has cross moved for leave to amend the complaint, annexing a proposed amended complaint.

### **Litigation History**

On May 15, 2006, Seven Springs, LLC commenced an action in this Court, inter alia, against TNC, the Burkes and the Donohoes under Index No. 9130/06, seeking declaratory judgment and injunctive relief, inter alia, a determination that plaintiff has an easement over the portion of Oregon Road south of the TNC parcel, which was not closed to the public.

In that action, defendants moved to dismiss plaintiff's complaint contending that plaintiff had no implied private easement over the relevant portion of Oregon Road and that any easement was extinguished when the relevant portion of Oregon Road ceased to be a town highway pursuant to Highway Law § 205(i). The Court, LaCava, J., granted defendants' motion. The Appellate Division, Second Department reversed, finding that plaintiff sufficiently stated a cause of action based upon an implied private easement arising in January, 1973 when a parcel of land bounded by a road and used at the time as a public highway was conveyed to plaintiffs' predecessor in interest. Additionally, defendants failed to establish as a matter of law that the private easement was abandoned or extinguished by adverse possession. The Appellate Division further found that the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements as Highway Law 205 does not provide for compensation to the owners of any private easements, which would be extinguished. Seven Springs, LLC v. Nature Conservancy, et al., 48 AD 3d, 545.

In the same action, the Court, R. Bellantoni, J., by decision and order dated April 19, 2008, granted TNC's motion for a preliminary injunction enjoining during the pendency of said action, plaintiff, its agents, employees and contractors, and all persons having knowledge of the order from .... "entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve("Nature Preserve") with any vehicle, equipment or machinery, and for any purpose other than to walk or hike upon same (provided, however, that surveyors employed or retained by plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by hand by one person), and performing any work upon any land owned by TNC, including the portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees, roadway grading, excavation; paving or preparing a roadway for paving, rock and/or debris removal)" .... The Court directed TNC to file a \$100,000. undertaking.

The injunction is currently in place and there has been no judicial determination as to plaintiff's alleged right of ingress or egress to the subject premises.

On or about March 14, 2008, plaintiff commenced an action in this Court entitled Seven Springs, LLC v. The Town of North Castle, Index No. 5484/08, which was settled by stipulation in February, 2009. Therein plaintiff sought quiet title to Oregon Road and claimed the right to utilize said road and defendant claimed that it had properly closed the road, effectively precluding any intended use of the road by plaintiff or any others.

### **Plaintiff's Cross Motion**

Plaintiff has moved for leave to serve an amended complaint. In accord with CPLR 3025(b) that such leave shall be freely given, plaintiff's cross motion is granted. Plaintiff's amended complaint in the form annexed to plaintiff's motion papers as Exhibit A is deemed served. The allegations of plaintiff's amended complaint have been addressed in defendants' reply papers and considered by the Court.

Plaintiff's amended complaint reiterates many of the allegations of plaintiff's complaint. Recounting that the Town of Bedford Planning Board required that the plaintiff have a secondary access to the subject parcel, the amended complaint alleges that the only viable secondary access to the parcel, and the only means by which access can be had to any public highway, street, road or avenue from the parcel to the south, is via the road known as Oregon Road. The Town of Bedford Planning Board's refusal to permit development of the parcel would not have occurred but for defendants' actions.

Within a single cause of action and not separately stated and numbered, CPLR 3014, plaintiff reiterates its prima facie tort allegations and additionally alleges that, that defendant made statements impugning plaintiff's title to the parcel and the easement, asserting that plaintiff has no right, title or interest to the easement. The statements were commonly and naturally interpreted to be disparaging, were communicated to third parties, including Town Boards, and were intentional, reckless, negligent or malicious, as well as false and known by defendants to be false and harmful to plaintiff. Defendants' actions were effected by dishonest, unfair and/or improper means, committed without reasonable justification and/or were otherwise motivated solely by malice and ill-will to plaintiff as they intended to, and actually did, cause injury to plaintiff by preventing plaintiff from exercising its property rights over the easement area, accessing the parcel over Oregon Road, preventing plaintiff's development of the parcel and exercising its full use and enjoyment of the easement and the parcel. Disinterested malevolence is the sole motivation for defendant's actions and it is causing plaintiff continuing damages.

The amended complaint cites the Appellate Division decision, supra, alleging that by reason thereof it has been judicially determined that the Town of North Castle never extinguished the easement pursuant to Highway Law 205. Nor do defendants have any right, title and interest in and to Oregon road or the easement area.

Plaintiff seeks damages of not less than \$60,000,000.; \$5,000,000. for plaintiff's inability to use its easement, \$5,000,000. for plaintiff's inability to access its parcel from the south at Oregon Road and \$50,000,000. for diminution in value of plaintiff's parcel.

Defendant, TNC replies that plaintiff's amended complaint should be dismissed initially because the amended complaint does not allege that TNC or the other defendants did anything actionable, sounding in a claim for prima facie tort. TNC's actions in defending itself in the 2006 action and obtaining a preliminary injunction are privileged and cannot underpin a prima facie tort claim. The amended complaint essentially seeks to attack the preliminary injunction, the proper remedy for which is an action on the undertaking. Nor has plaintiff alleged particular special damages. Additionally, the prima facie tort claim is barred by the one year statute of limitations and alleges no basis for punitive damages against TNC, which merely defended the actions against it and did not engage in conduct in the nature of moral turpitude.

The Burke defendants reply notes that plaintiff did not pursue its appellate remedy with respect to the preliminary injunction in the 2006 action and the amended complaint, in lieu of the appeal, is untimely. The Burke's opposition to plaintiff's 2006 action was not motivated only by disinterested malevolence; the preliminary injunction properly issued. The amended complaint lacks specific factual allegations of illegal actions as to liability and special damages, and indeed, falls within the parameters of a SLAPP suit, Civil Rights Law 76-A(i) (a). The proper action to contest the propriety is an action for damages under the designated undertaking. Nor has plaintiff properly pleaded special damages, nor alleged egregious tortious conduct warranting punitive damages. Plaintiff has alleged no claim which has a substantial bases in law or fact.

The Donohoe defendants reply citing the doctrine of collateral estoppel in that the amended complaint alleges issues previously considered by Bellantoni, J. with respect to the issuance of the preliminary injunction in the 2006 action, which was not appealed and is now being invoked as the reason for plaintiff's alleged damages. Plaintiff may proceed against the preliminary injunction undertaking, when, as and if it is eventually determined that the preliminary injunction should not have been issued.

Plaintiff acknowledges that its instant action simply seeks to assert plaintiffs rights to damages against defendants should it be determined that the defendant have wrongfully prevented plaintiff from using and exercising its rights with respect to the easement. The Court notes the preliminary injunction issued in favor of defendants and that the prior action in which the preliminary injunction issued is effectively dormant, supra.

On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts as alleged within the four corners of the complaint and accord the plaintiff the benefit of every possible favorable inference to determine whether the allegations fit within any cognizable legal theory. See, Leon v. Martinez, 84 NY2d 83, 87-88, Guggenheimer v. Ginzburg, 43 NY2d 268, 275; Rovello v. Orofino Realty Co., 40 NY2d 633, 634. "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleadings has a cause of action, not whether she has stated one." Meyer v. Guinta, 262 AD2d 436.

The Court cannot determine as a matter of law that plaintiff has failed to state a cause of action for prima facie tort and/or slander of title. Plaintiff has alleged that disinterested malevolence was the sole motivation for defendants' conduct and has alleged specific and measurable loss to the value of its property and its development. See, Friehofer v. Hearst Corp., 65 NY 2d 135; Epifari v. Johnson, 65 Ad 3d 224. Additionally, plaintiff has sufficiently stated a cause of action for slander of title, having alleged that defendants made communications falsely casting doubt as to the validity of plaintiff's title, reasonably calculated to cause harm and resulting in special damages. See, 39 College Point Corp. v. Transpec Capital Corp., 27 AD 3d 454.

Defendants' motions are denied.

Defendants shall serve their respective answers within ten (10) days of the service of a copy of this order with notice of entry. CPLR 3211(f).

This action is referred to the Preliminary Conference Part for the scheduling of a preliminary conference in due course.

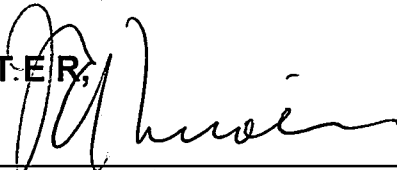
The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York

2010

June 21,

ENTER,



HON. FRANCIS A. NICOLAI, J.S.C.

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Preliminary Conference Part